Supreme Court, U.S.
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No. _____

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In the Supreme Court of the United States

KENNETH G. HELFRICH,
Petitioner,

v.

PNC BANK, KENTUCKY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act was expressly designed to protect the interest of plan participants, broaden the common law of who constitutes a fiduciary, and establish uniformity in the law. 29 U.S.C. §1001 *et seq.* As a matter of recourse for a fiduciary breach, a plan participant may bring a private civil action against that fiduciary seeking "appropriate equitable relief" under 29 U.S.C. §1132(a)(3). In *Mertens v. Hewitt*, 508 U.S. 248 (1993), this Court held "appropriate equitable relief" meant relief typically available in equity (such as injunction, mandamus, and restitution), but not compensatory damages.

Since *Mertens*, the lower Courts have concluded monetary damages may be considered restitution. However, a conflict has arisen among the Circuits and this Court concerning when monetary damages constitute an "appropriate equitable remedy." Here, the District Court found this case to be one in equity, where monetary damages in the form of restitution as a "make-whole" remedy was appropriate. On the other hand, the Sixth Circuit reversed the District Court, despite a breach of fiduciary duty by the Respondent resulting in Petitioner suffering lost investment earnings, since there was no unjust enrichment by the Respondent. Various Federal Courts have approached the issue in a variety of fashions; some in direct conflict with others. Hence, the establishment of uniformity in the law, envisioned by Congress by its passage of ERISA, has been thwarted.

The question presented is whether ERISA's "appropriate equitable remedy" provision (29 U.S.C. 1132(a)(3)(B)) provides for restitution only upon a showing of unjust enrichment on the part of the fiduciary, or does

it provide a "make-whole" remedy for plan participants, when a fiduciary knowingly breaches its statutory duty to the plan participant.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Kenneth G. Helfrich, an individual, states he is not subject to the provisions of Rule 29.6 since he is not a non-governmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The District Court's Opinion (per Simpson III, Charles) denying Respondent's summary judgment motion (Pet. App. 13a -38a) is not published. The Court of Appeals Opinion (per Krupansky) reversing the District Court's Opinion (Pet. App.1a - 12a) is published at 267 F.3d 447.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Employer Retirement Income Security Act, 29 U.S.C. §1001, *et seq.* ("ERISA") relevant to this Petition, 29 U.S.C. §1132 is reprinted in the Appendix at 48a - 58a.

STATEMENT OF CASE

1. Petitioner was a member of an employer-sponsored 401(k) profit sharing plan under which Respondent, PNC Bank Kentucky, Inc. was a directed trustee. The Basic Plan Document required PNC Bank, as trustee, to make "distributions from the fund in accordance with written instructions received from an authorized representative of the employer." In April of 1996, Petitioner directed Respondent to effect a direct rollover of the bulk of his assets into specified mutual funds, and to distribute to Petitioner a portion of the remaining funds. On July 11, 1996, Respondent liquidated and transferred the plan assets, however failed to follow Petitioner's prior instructions to rollover his plan assets into the specified mutual funds. The liquidated assets were placed into money market funds, which had a lower return of investment.

On December 3, 1998, Petitioner filed a complaint in the Federal District Court for the Western District of Kentucky alleging that Respondent breached its fiduciary duty towards him in violation of ERISA. (Pet. App. at 42a - 47a). Petitioner demanded "appropriate equitable relief", including but not limited to "restitution, disgorgement, injunctive relief, and/or monetary damages" for Respondent's failure to follow his directives which caused him to sustain considerable loss. Petitioner alleges he is entitled to the difference between the amount he would have earned if Respondent had completed the requested rollover in a timely fashion and the amount he in fact earned as a result of the Respondent's breach of its fiduciary duty.

2. Respondent was the Trustee/Custodian responsible for "distributions from the fund in accordance with written instructions received from an authorized

representative of the employer," as well as responsible for the administration of investments held by the fund. It is undisputed the Respondent agreed to invest Petitioner's funds in accordance with his instructions and failed to perform this contractual duty.

Nonetheless, Respondent moved to dismiss the case, or in the alternative for summary judgment, on grounds that Petitioner's requested remedy was for "extra-contractual" damages, compensatory in nature, which are precluded by *Mertens*. Petitioner responded by stating ERISA provides for a "make-whole" remedy designed to put a plan participant in the position he or she would have occupied if not for the offending fiduciary's breach.

3. On October 5, 1999 the District Court denied Respondent's Motion to Dismiss in Part, finding that:

> "Helfrich's claim under §1132(a)(3) is in the nature of restitution–he seeks to be placed in the position he would have been had not PNC allegedly failed to follow his directions with respect to his plan benefits. The Court cannot turn back the hands of time should he prevail on his claim, however, the Court can seek to fashion an award to duplicate the benefit as he would have obtained had his directions been followed."

Helfrich v. PNC Bank, No. 98-374, slip op. At 15 (W.D. Ky. Oct. 5, 1999). In holding that Petitioner was entitled to a monetary award in the form of restitution, the District Court reasoned that post-*Mertens*' decisions dictated that Petitioner

be entitled to his losses under ERISA.[1]

The District Court concluded that Petitioner did not seek restitution from someone other than the fiduciary. Moreover, Petitioner only sought to be placed in the position he would have been had the Respondent not committed a breach of trust. Fundamental to the District Court's holding was that ERISA seeks to provide plan participants appropriate remedies and ready access to the Federal courts. On December 22, 1999, the District Court amended its October 5, 1999 Order noting the legal importance of the issue resolved by its previous Order, and certifying its immediate interlocutory appeal. *Helfrich v. PNC Bank*, No. 98-734 (W.D.Ky. Dec. 22, 1999).

4. On Respondent's appeal, the Sixth Circuit reversed the District Court's holding and recognizing restitution constituted an "appropriate equitable relief" under ERISA. The Court held:

> "ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries. Confronted with this obstacle to recovery of his loss, Helfrich denominated his request relief as 'restitution' while measuring that relief with reference to his losses rather than PNC Bank's gains. That measure is the hallmark of money damages."

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[1] *Varity Corporation v. Howe*, 516 U.S. 489 (1996); *Allinder v. Inter-City Products Corporation*, 152 F.3d 544 (6th Cir. 1999), *cert. denied*, 525 U.S. 1178 (1999); *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999).

Helfrich v. PNC Bank, No. 00-5148, slip op. at 10(6 Cir. Oct. 1, 2001). The Court made this decision despite the Respondent acknowledging at oral argument that the Petitioner would have had a right to an equitable remedy, in the form of an injunction, if Respondent had provided full information to the Petitioner from the outset. Essentially, the Sixth Circuit holding establishes a new law of equity requiring unjust enrichment for "make-whole" remedies. Further, despite the District Court's finding the Petitioner's suit sounds in equity, the Sixth Circuit's holding rewards the breaching fiduciary for failing to provide timely information to those for whom it owes a duty. Clearly, the Sixth Circuit failed to consider ERISA's mandate that fiduciaries are to discharge their duties "solely in the interest of participants and beneficiaries." §404(a).

5. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition should be granted for the following reasons. First, the Sixth Circuit Opinion conflicts with the holding of this Court and other Federal court decisions. Since this Court's ruling in *Mertens*, the Federal Circuit Courts and many District Courts have interpreted the "appropriate equitable relief" provision inconsistently. By holding unjust enrichment must be present in order for a plan participant to recover restitution under §1132(a)(3)(B), the Sixth Circuit decision adopted a legal principle in conflict with this Court and other Circuits. Thus, review should be granted to prevent this lack of uniformity, which is mandated by Congress. *ERISA*, §1001.

Second, the Sixth Circuit decision conflicts with ERISA's purposes. It held a plan participant may not recover losses as restitution, unless the fiduciary has been unjustly enriched. Such a holding is in direct contradiction with equity's goal to treat that as done which ought to have been done. As stated in Justice White's dissent in *Mertens*, ERISA must be construed to provide a remedy to make victims whole, and to avoid the anomaly of interpreting ERISA so as to leave those Congress set out to protect with less protection that they enjoyed before ERISA was enacted. *Mertens*, at 267. Accordingly, certiorari should be granted to prevent the emasculation of ERISA's legislative mandates.

This case provides the unique circumstance in which an issue is ripe for review and a clean record exists upon which the Court may clearly resolve the issue. The Respondent admitted during oral arguments before the Sixth Circuit that the Petitioner was entitled to an injunction if Respondent had provided him with full information. Thus, there is no dispute whether the remedy sought is equitable or

legal. Also, the losses claimed by Petitioner are only these amounts which would have made him whole. The amounts claimed flow directly from Respondent's knowing breach of its contract with Petitioner, and thus are not "extra-contractual" in nature.

The appropriate test to determine whether a remedy is "appropriate equitable relief" is whether the plaintiff's complaint, and the basic nature of the case, sounds in equity. Could the Petitioner have received equitable relief had he been in the position to do so, or are his claims purely legal in nature? If Petitioner's writ is denied the uniformity in the law Congress sought will be thwarted. Accordingly, this Court must grant certiorari to provide uniformity in the law establishing a clear standard as to when losses, resulting from a fiduciary's knowing breach, constitutes "appropriate equitable relief" pursuant §1132(a)(3)(B).

I. Certiorari is warranted because the decision below conflicts with the decisions of this court and other circuits.

In *Mertens*, this Court held "equitable relief" can also refer to those categories of relief that were typically available in equity (such as injunction, mandamus and restitution, but not compensatory damages). *Mertens,* 508 U.S. at 256. However, this Court reserved the dispute over what forms of relief are available to remedy a knowing fiduciary breach for another day. In *Varity*, this Court held where a plaintiff could not proceed under any other ERISA remedial provision and must rely on §1132(a)(3)(B) for recourse, that granting a remedy to the plaintiff is "consistent with the literal language of the statute, the acts purposes, and preexisting trust law." *Varity* at 516, U.S. 514.

The Sixth Circuit decision conflicts with *Mertens* and *Varity* in several ways: In *Mertens*, the Court held restitution was recoverable and reserved the issue regarding what types of remedies are available. Despite Petitioner's claim utterly sounding in equity, the Sixth Circuit cites *Mertens* as authority for a narrow interpretation of what constitutes restitution, and held restitution is only available upon a showing of unjust enrichment by the fiduciary. Further, despite this Court's holding in *Varity* that §1132(a)(3)(B) provides a remedy for plan participants where no other ERISA remedial provision is applicable, the Sixth Circuit decision foreclosed the Petitioner's right to recover for his losses as a result of a knowing fiduciary breach.

Since *Mertens*, the Circuit courts have addressed the issue of when losses may be considered restitution inconsistently. In essence, the Courts of Appeal have created a scenario where a plan participant's ability to recover for a fiduciary's breach depends on the fortuitous circumstance of where the fiduciary's breach occurred, and not whether the fiduciary breached its duty.

In Second Circuit, the Petitioner would be entitled to recover his lost investment earnings, but not in the Eighth Circuit and Sixth Circuit unless the fiduciary was unjustly enriched. In the Seventh Circuit, Petitioner would be required to prove the fiduciary was unjustly enriched by a showing society's reasonable expectations of person and property would be defeated by non-payment of the Petitioner's lost investment earnings.[2]

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[2] The First, Third, Ninth, and Tenth Circuits, under a variety of tests, have also held a plan participant must prove unjust enrichment on the part of the fiduciary.

The Second Circuit addressed the issue by holding that a monetary "make whole" remedy was available to plaintiff under §1132(a)(3)(B) "*to eliminate the direct economic effect*" of a fiduciary's breach of the terms of the plan, an ERISA violation:

> Allowing [plaintiff] to recover the benefit she would have received absent the alleged breach of duty, but no consequential or other damages, would be entirely consistent with Congress' and the [Supreme] Court's characterization of the 'make whole' remedy of back pay as equitable in character notwithstanding the fact that an employer who engages in unlawful employment discrimination ordinarily is not enriched thereby. Hence, granting this remedy would be consistent with the language and purposes of [ERISA].

Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2d Cir. 1999).

Even though several Circuits have adopted an unjust enrichment analysis, each Circuit has decided the issue with its own particular nuances causing plan participants to litigate the issue differently depending upon where the fiduciary breach occurred. For example, the Eighth Circuit held a plan participant was not entitled to an award of monetary damages for all losses sustained as a result of the fiduciary's breach, but did authorize restitutionary award as a corollary to an injunction which restored plan participants to the position they would have occupied had the breach never occurred. *Kerr v. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999). In *Kerr*, the Court disagreed with Third Circuit decisions on the matter

which held restitution was available as long as the plaintiff couched his suit in equity.[3] While the Seventh Circuit has held unjust enrichment as a requirement for recovering restitution under §1132(a)(3), a plan participant must also demonstrate that he and the fiduciary both had reasonable expectations of payment, or society's reasonable expectations of personal property would be defeated by non-payment. *Harris Trust & Savings Bank v. Provident Life & Accident Insurance Co.*, 57 F.3d 608 (7th Cir. 1995).[4] More recently, the soundness of *Mertens* has been questioned by Circuits holding unjust enrichment is a requirement for recovery under §1132(a)(3)(B).[5]

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[3] *Re: Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 57 F.3d 1255 (3rd Cir. 1995) (holding a retiree was entitled to recover post-retirement benefits upon proving a fiduciary breach since the retirees sat an injunction ordering specific performance of the assurances the defendant made and restitutionary reimbursement for back benefits); *Hein v. FDIC*, 88 F.3d 210 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997) (holding that the plaintiff was not entitled to monetary damages since he did not characterize the amounts as restitution and there was no deceit by management); *Fotta v. Trustees of the United Mine Workers of Am. Health & Retirement Fund*, 165 F.3d 209 (3rd Cir. 1998) (holding an award for interest on past-due benefits was recoverable since it was payment for the time value of money and an award of interest is an equitable remedy enforcing an ERISA plan provision).

[4] See also *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509 (7th Cir. 1993) and C. Kaufman, *Corbin on Contracts*, Sec. 19A at 50 (Supp. 1989).

[5] See *Allinder v. Inter-City Products Corp.*, 152 F.3d 544 (6th Cir. 1999), *cert. denied*, 525 U.S. 1178 (1999)(*Mertens* 5-4 decision has resulted in a "betrayal without a remedy" since it

The inconsistent decisions are not only between the Circuits but within the Circuits as well. The Sixth Circuit has held on one hand that ERISA plaintiffs may be made whole for "lost use of money" and awarded restitution to restore the plaintiff to the position she would have enjoyed. *Ford v. Uniroyal Pension Plan*, 154 F.3d 613 (6th Cir. 1998); *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995). On the other hand, the Sixth Circuit decision at issue held a plaintiff seeking to be made whole for his loss use of money is not entitled to restitution without proving the fiduciary was unjustly enriched by its knowing breach.

Here, the Petitioner only seeks to be placed in a position he would have been in despite the fiduciary's breach. He seeks the difference in interest he would have received if the Respondent had followed his directives, and what he actually received as a result of the Respondent's breach. Petitioner cannot be "made-whole" without receiving this interest and it is the only manner of enforcing an explicit ERISA plan provision. Under *Strom*, the Petitioner would be entitled to recover benefits which would make him whole, while under *Kerr* the Petitioner would only be entitled to be placed in the position he would have occupied had the breach never occurred as a corollary to an injunction.

It is undisputed the Petitioner would have been entitled to an injunction if he was provided full information by the

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precludes state law claims, but does not provide for an alternative ERISA claim"; *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999) (holding that under *Mertens* it is dubious whether a plan beneficiary would get "appropriate remedies" as Congress intended); see also *Bast v. Prudential Insurance Company*, 150 F.3d 1003 (9th Cir. Cal. 1998) and *Cannon v. Group Health Serv.*, 77 F.3d 1270 (10th Cir. 1996).

Respondent in a timely fashion. Instead the Sixth Circuit held Petitioner's relief under ERISA was predicated on timing, not whether the Petitioner suffered a loss as result of the Respondent's knowing breach, despite Petitioner's suit sounding in equity, and his losses being contractual in nature.

The conflict among the Circuits' holdings concerning the right to restitution from a fiduciary under ERISA is apparent. Even those Circuits apparently agreeing that unjust enrichment is a necessary element, disagree as to the application of that standard, calling into question the result a litigant may encounter. Other Circuits have adopted utterly conflicting standards. Under these circumstances, certiorari is warranted to provide uniformity under ERISA as mandated by Congress.

II. Certiorari is warranted since the decision below is a clear deviation from ERISA's stated purposes to protect plan beneficiaries and provide them a broad range of remedies.

One consistent theme emerges from this Court's decisions and ERISA's statutory language- promote the interests of employees and their beneficiaries in employee benefit plans.[6] Thus, the Court has been reluctant to interpret

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[6] *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 113 (1989); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) (ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.); §1001(b) (ERISA is "to protect...the interests of participants in employee benefit plans and their beneficiaries."); §1001(c)(ERISA contains certain safeguards and protections which help guarantee the

ERISA in a way that "would afford less protection to employees and their beneficiaries that they enjoyed before ERISA was enacted." 489 U.S. at 114. The Sixth Circuit's holding clearly curtails Petitioner's protection, and is in direct contradiction with this Court's mandates. The conflict is inexplicable given that ERISA abounds with language and terminology of trust law, and courts are to consult general principles of trust law developed by the courts of equity to determine what relief can be deemed appropriate, equitable relief under §502(a)(3).

In the realm of trust law, monetary relief has long been a traditional equitable remedy. The Restatement (2d) of Trusts illustrates this conclusion. Section 199 sets forth the "equitable remedies" available to the beneficiary of a trust. The third of these, in §199(c), allows the beneficiary "to compel the trustee to redress a breach of trust." *Restatement (Second) of Trusts*, 437 (1959). The comment to §199(c) explains that suit to gain redress should be governed by §205 of the Restatement, which permits an award of monetary relief by making the trustee liable for any **"loss"** to the trust caused by the breach of fiduciary duty. Moreover, it is clear that monetary relief available under §205 included a right to "make whole" damages. Thus,

> "the general rule [is] that the object of damages is to make the injured party whole, that is, to put him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty."

"equitable character and the soundness of [private pension] plans"); §1004(a)(l) (a fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries").

George Gleason Bogert and George Taylor Bogert, "The Law of Trusts & Trustees", §701, at L.198 (2d Ed. Rev. 1982); see *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985); see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975).

Accordingly, the Legislature drafted §1132(a)(3)(B) which allows for "appropriate equitable relief" in order to redress violations of ERISA's mandates or the terms of a plan. §1132(a)(3)(B) is typically invoked as a "safety net" where plaintiffs have no remedy under any of the other ERISA enforcement provisions. *Ream v. Frey*, 107 F.3d 147 (3d Cir. 1997). This Court, in *Mertens*, recognized restitution as an appropriate remedy. This Court also held where plaintiff would otherwise have no remedy at all, that no ERISA-related purpose would be served by precluding a remedy under this broadly defined section. *Varity Corporation v. Howe*, 516 U.S. 489 (1996).

In *Varity*, the Court held that §1132(a)(3)(B) authorized individual plaintiffs to seek relief for harm caused by the fiduciary' breach of obligations. This Court went on at length to discuss the purpose behind the inclusion of §1132(a)(3)(B) as a "catch-all" provision, noting:

> "The statute itself says that it seeks 'to protect...the interest of participants...and...beneficiaries and by establishing standards of conduct, responsibility, and obligation for fiduciaries... and... providing for appropriate remedies... and ready access to the federal courts.'
> ERISA §2(b)....Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that

> harm individuals by denying injured beneficiaries a remedy."

Varity, 516 U.S. at 513 (emphasis added). As a result of this Court's *Mertens* and *Varity* holdings, there has been considerable controversy over the question of what constitutes "appropriate equitable relief" under §1132(a)(3)(B).

As the legislative history leading to ERISA's enactment states,

> "The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants."

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., reprinted in 3 U.S.C.C.A.N. 4639, 4655 (1974); S.Rep. No. 93-127, 93d Congress., 2d Sess., reprinted in 3 U.S.C.C.A.N. 4838, 4871 (1974)(emphasis added).

As the plaintiff in *Ream*, Petitioner has no alternative means to recover his losses, and §1132(a)(3)(B) is his only avenue of recourse. Petitioner suffered a direct, clearly defined personal loss as a result of Respondent's conduct. The Petitioner does not seek classic legal damages such as

punitive damages or damages for the loss of opportunity, but rather an equitable remedy. In all respects, Petitioner's suit sounds in equity, and thus his remedy should be deemed an "appropriate equitable remedy."

The legislative history of ERISA supports Petitioner's view that the personal recovery he seeks is "appropriate equitable relief." ERISA imposes

> "strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust."

120 Cong. Rec. 15737 (1974)(Comments of Sen. Williams when introducing the Conference Report), reprinted in (1974) U.S.C.C.A.N. 5177, 5186.

If the Petitioner does not have a remedy for the fiduciary's breach, as held by the Sixth Circuit, what is the incentive of any fiduciary performing its duties properly? The problems created by the decision below are more troubling because the Sixth Circuit has failed to keep in mind ERISA's purposes, and has decided ERISA remedies are predicated on timing. ERISA was passed in the attempt to establish a uniform law concerning the actions of fiduciaries. ERISA also should be read to encourage remedying fiduciary breaches, while §1132(a)(3)(B) should be read as a "catch-

all" provision, providing a remedy for any circumstance which does not fit within ERISA's other remedial provisions.

In sum, the traditional existence of a right of equitable recovery for individuals in the Petitioner's position, coupled with ERISA's purposes, provides unequivocal support for the conclusion that the remedy sought by the Petitioner is "appropriate equitable relief" to redress" the Respondent's knowing breach of fiduciary duty. The Sixth Circuit decision not only rejected these principles, but did so in a manner that brought the interpretation of §1132(a)(3)(B) into direct conflict with other Circuits, thus meriting review and reversal by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 00-5148

[Filed October 1, 2001]

KENNETH G. HELFRICH, *Plaintiff-Appellee*,	)
v.	)
PNC BANK, KENTUCKY, INC., *Defendant-Appellant*.	)

Appeal from the United States District Court
for the Western District of Kentucky at Louisville
No. 98-00734
Charles R. Simpson, III, Chief District Judge

JUDGES:
Before: KRUPANSKY, SUHRHEINRICH and SILER, Circuit Judges.

OPINION

KRUPANSKY, Circuit Judge.

Defendant-Appellant PNC Bank, Inc. ("PNC Bank") has challenged, by interlocutory appeal, the district court's denial of its motion to dismiss this action, by which PNC Bank has contended that the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") does not authorize the relief requested by Plaintiff-Appellee Kenneth J. Helfrich ("Helfrich").

Helfrich participated in an employer-sponsored 401(k)[1] profit sharing plan. PNC Bank administered that plan for Bulk Distribution Centers, Helfrich's employer. The Basic Plan Document required PNC Bank as Trustee/Custodian to make "distributions from the Fund in accordance with written instructions received from an authorized representative of the Employer." At all times relevant to the subject controversy, Donald L. Stump ("Stump"), President of Bulk Distribution Centers, was the "individual authorized to issue instructions to the Trustee/Custodian."

On April 30, 1996, Helfrich instructed Brenda Higgins ("Higgins"), Vice President at PNC Bank for Employee Benefit Administration, to "effect a direct rollover" of the bulk of his assets (roughly $700,000) into specified mutual funds and to distribute to Helfrich a portion of the remaining funds (roughly $ 61,000). On May 1, 1996, Donald Stump

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[1] The Internal Revenue Code accords special tax treatment to contributions to plans that qualify under 26 U.S.C. § 401(k).

authorized Brenda Higgins to roll over "$700,000 from Mr. Helfrich's equity fund to the mutual fund accounts he specified in his Distribution Response Form."

On May 15, 1996, Higgins, Stump, and Helfrich met to discuss Helfrich's requested actions. Stump has averred, via sworn affidavit, that

> 1. During this meeting Ms. Higgins agreed that:
>
> (a) because of the significant increase in the market value of the PNC-Compass mutual funds Mr. Helfrich's 401(k) pension plan funds were invested in, he could rollover $700,000 without affecting the pre-1987 contribution balance. If the [net asset value] of these funds declined significantly prior between May 15, 1996 and June 30, 1996 the rollover amount would have to be reduced.
>
> (b) *to effect the rollover quickly* without losing 01/01-6/30/96 earnings and to avoid delays in effecting the rollover which could be expected after Lincoln[2]

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[2] As discussed *infra*, on July 1, 1996, Stump transferred administration of the profit-sharing plan to Lincoln National Life Insurance Company ("Lincoln").

> becomes custodian, PNC would effect the rollover after 6/30/96 but *before any funds were forwarded to Lincoln.*
>
> 2. Ms. Higgins had previously requested a letter from me authorizing this rollover which I provided on May 1, 1996.
>
> 3. Mr. Helfrich asked Ms. Higgins if there was anything else he, as participant, or me, as Plan Administrator, needed to do to make sure this rollover occurred as outlined above. Ms. Higgins said nothing else was required. She further stated that since she had my authorization letter and the actuaries' fax showing the pre-1987 contribution she would effect the rollover as described in 1 (b) above.

(emphasis added and paragraph numbers changed).

On June 28, 1996, Stump notified Higgins by way of fax that

> effective July 1, 1996, Bulk Distribution Centers will be transferring its 401(k) profit sharing plan to a prototype plan sponsored by Lincoln National Life Insurance Company ["Lincoln"]. Lincoln will become the custodian and investment manager for the plan. Bulk Distribution Centers, therefore, is cancelling its participation in the prototype cash or deferred profit sharing plan and trust sponsored by PNC Bank effective July 1,

1996.

On July 11, 1996, as per the instructions contained in Stump's letter dated June 28, 1996, Higgins liquidated and transferred plan assets to Lincoln. However, Higgins failed to follow Helfrich's instructions as to rolling over his plan assets into specified mutual funds before transferring the balance of the funds to Lincoln. Lincoln placed the monies it received into money market funds.

On December 3, 1998, Helfrich filed a complaint in federal district court, alleging that PNC breached its fiduciary duty towards him in violation of ERISA. Helfrich demanded "appropriate equitable relief including, but not limited to: restitution, disgorgement, injunctive relief, and/or monetary damages." In his complaint, Helfrich contended that PNC Bank's error caused him to suffer a significant economic loss because Lincoln's investment of Helfrich's plan assets appreciated at a much slower rate than did Helfrich's specified mutual funds. Helfrich maintained that he was therefore entitled to the difference between the amount he would have earned if PNC Bank had completed the requested rollover and the amount he in fact earned as a result of his monies remaining in the Lincoln-controlled money market fund.

On April 13, 1999, PNC moved to dismiss the case, arguing that Helfrich's requested remedy was not equitable and therefore not authorized by ERISA. On June 18, 1999, Helfrich filed his response, contending that he had requested restitution, which is authorized by ERISA.

On October 5, 1999, the district court denied PNC

Bank's motion to dismiss in part,[3] finding that

> Helfrich's claim under § 1132(a)(3) is in the nature of restitution-he seeks to be placed in the position he would have been had not PNC allegedly failed to follow his directions with respect to his plan benefits. The court cannot turn back the hands of time should he prevail on his claim. However, the court can seek to fashion an award to duplicate the benefit as he would have obtained had his directions been followed.

Helfrich v. PNC Bank, No. 98-734, slip op. at 15 (W.D. Ky. Oct. 5, 1999).

On December 22, 1999, the district court amended its October 5, 1999 order, noting the legal importance of the issue resolved by its previous order, and certifying its immediate interlocutory appeal. *Helfrich v. PNC Bank*, No. 98-374 (W.D. Ky. Dec. 22, 1999). PNC Bank then moved a separate panel of this court to permit immediate appeal. On February 11, 2000, this court granted the motion. *Helfrich v. PNC Bank*, No.00-5148 (6th Cir. Feb. 11, 2000). On February 14, 2000, PNC Bank then filed its timely notice of appeal.

This court reviews *de novo* the district court's denial of a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss for failure to state a claim upon which relief can be

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[3] In its motion to dismiss, PNC Bank had also moved to dismiss the other two counts in Helfrich's complaint. The district court granted PNC Bank's motion as to these counts and dismissed them with prejudice. None of those counts are relevant to this appeal.

granted. *See Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 865 (6th Cir. 2000). In order to survive a motion to dismiss, the plaintiff's complaint must allege facts, which if proved, would entitle the claimant to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

ERISA permits plan beneficiaries, plan administrators, and the Secretary of Labor to enforce its provisions. *See* 29 U.S.C. § 1132(a)(1)-(6). However, ERISA distinguishes between those parties in the types of relief it makes available to them. Acting on behalf of a benefit plan, the Secretary of Labor and the plan administrator are entitled to seek the full gamut of legal and equitable relief. *See id.* In contrast, ERISA restricts plan *beneficiaries* to *equitable relief* with no recourse to money damages. *See* 28 U.S.C. § 1132(a)(3); *Mertens v. Hewitt Associates*, 508 U.S. 248, 255, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993).

In particular, ERISA provides that a civil action may be brought

> (3) by a participant, *beneficiary*, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate *equitable* relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (emphasis added).

The *Mertens* Court emphasized that money damages, as traditionally understood, are not encompassed within the phrase "appropriate equitable relief:"

> Petitioners maintain that the object of their suit is "appropriate *equitable* relief" under § 502(a)(3) (emphasis added). They do not, however, seek a remedy traditionally viewed as "equitable," such as injunction or restitution.... Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages*-monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief.

Mertens, 508 U.S. at 255.

Nevertheless, in disallowing money damages, the *Mertens* court specifically authorized restitutionary relief. *See id.* However, Helfrich's requested remedy-that PNC Bank should compensate him for the losses he suffered because PNC Bank failed to transfer his assets to higher performing mutual funds-constitutes money damages, not restitution. Had PNC Bank invested his money for its own benefit in a separate unauthorized, but better performing, account, PNC Bank would be liable to Helfrich in restitution for the principal and its ill-begotten gain. Helfrich's principal has, however, been restored and there is no allegation that PNC Bank profited by its improper maneuver. As such, there is nothing to *restore* to Helfrich, and therefore no basis for restitutionary relief.

As the Eighth Circuit has noted, when confronted with a similar case:

> the basic distinction between equitable restitution and compensation focuses on the genesis of the award sought by the plaintiff. A restitutionary award focuses on the defendant's wrongfully obtained gain while a compensatory award focuses on the plaintiff's loss at the defendant's hands. Restitution seeks to punish the wrongdoer by taking his ill-gotten gains, thus, removing his incentive to perform the wrongful act again. Compensatory damages on the other hand focus on the plaintiff's losses and seek to recover in money the value of the harm done to him.

Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999) (denying plaintiff's requested "monetary award for the difference between the return that he could have earned had he had control of the funds during the three-and-a-half years that [the defendant] wrongfully withheld payment of the 401(k) plan funds and the return that the plan earned during that time period");[4] *see also Porter v. Warner Holding Co.*,

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[4] Helfrich has relied on *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), for the proposition that his proffered measure of restitution is appropriate under ERISA. In *Howe*, the Eighth Circuit permitted recovery by the plaintiffs of payments they would have received had they not been wrongfully induced by their employer to exit the employee benefit plan. *See Howe*, 36 F.3d at 756-57. The Eighth Circuit characterized such relief as restitution. *See id.* However, in *Howe*, the Eighth Circuit determined that the

328 U.S. 395, 402, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946) (indicating that restitution involves "restoring the status quo and ordering the return of that which rightfully belongs" to another); Dobbs, Law of Remedies, at 555 (2d ed. 1993) ("Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss.").

In support of the proposition that ERISA authorizes his requested relief, Helfrich has relied principally on a pre-*Mertens* decision by this circuit, *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990). The *Warren* court concluded that "a beneficiary [in an action brought pursuant to Section 1132(a)(3)] is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages." *Warren,* 905 F.2d at 982. Helfrich's reliance on *Warren* is misplaced, however, because that case was abrogated by *Mertens*. *See Fraser v. Lintas: Campbell-Ewald*, 56 F.3d 722, 724 (6th Cir.) ("In our view, *Mertens*

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employees were entitled to an injunction reinstating them to the plan. *Id.* at 756. As the Eighth Circuit later noted in *Kerr*, it allowed recovery of the payments as an incident of the injunction. *See Kerr,* 184 F.3d at 944 ("Our 'restitutionary' award was necessary as a corollary to the injunction-restoring plaintiffs 'to the position they would have occupied [as participants in the plan] if the misrepresentation...had never occurred." (quoting *Howe,* 36 F.3d at 756.)) In the matter before the court, the district court did not issue an injunction, nor would an injunction have been appropriate. Helfrich's reliance on *Howe* is therefore unavailing.

effectively overrules *Warren.*"), *cert. denied*, 516 U.S. 975 (1995). As noted earlier, the *Mertens* Court rejected the applicability of money damages in an action brought pursuant to Section 1132(a)(3). *See Mertens,* 508 U.S. at 255.

Helfrich has observed that, under the law of trusts, a traditional court of equity could award money damages in a lawsuit for a trustee's breach of fiduciary duty. *See Restatement (Second) of Trusts*, § 205, comment a (1959) (explaining that a beneficiary is entitled to a remedy "which will put him in the position in which he would have been if the trustee had not committed the breach of trust."). Helfrich has argued that "appropriate equitable relief" must therefore include his measure of restitution. However, the *Mertens* court rejected that argument as well. *See Mertens,* 508 U.S. at 256 ("Limiting the sort of relief obtainable under §502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief not at all. We will not read the statute to render the modifier superfluous.").[5]

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[5] The Second Circuit in *Strom v. Goldman Sachs, Inc.*, 202 F.3d 138 (2d Cir. 1999), reached the opposite conclusion as to the availability of Helfrich's requested relief under ERISA. In *Strom*, the plaintiff's husband had applied for additional life insurance through his employer. *Id.* at 140. The employer failed to forward the application to its insurer in a timely manner and, as a result, plaintiff did not receive benefits under that policy when her husband died. *Id.* at 141. The Second Circuit awarded recovery of the additional life insurance to the plaintiff from the employer, finding that Congress intended that Section 1132(a)(3) should "eliminate the *direct* economic effect," *id.* at 148 (emphasis added), of a violation of ERISA. However, the instant court finds no

ERISA does not permit plan beneficiaries to claim money damages from plan fiduciaries. Confronted with this obstacle to recovery of his loss, Helfrich denominated his requested relief as "restitution" while measuring that relief with reference to his losses rather than PNC Bank's gains. That measure is the hallmark of money damages. Because the Supreme Court has specifically disallowed money damages as "appropriate equitable relief" under ERISA, the district court's decision to deny PNC Bank's motion to dismiss is **REVERSED** and this cause is **REMANDED** with instructions to dismiss this matter with prejudice.

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support for a distinction between "direct" and "indirect" damages in determining whether relief is available under Section 1132(a)(3) and *Mertens*.

The Second Circuit then analogized recovery of the additional life insurance to recovery of backpay in an action challenging unlawful employment discrimination; the Supreme Court has already characterized such relief as equitable in the context of an action brought pursuant to the National Labor Relations Act. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). That contention is unpersuasive. When it illegally discharges one of its employees, the employer retains wages it would ordinarily have had to pay if it had not committed the illegal act. In the case before this court (and in *Strom* as well), the defendant has not retained any money which could be "restored" to the plaintiff.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:98CV-734-S

[Filed October 5, 1999]

KENNETH G. HELFRICH, *PLAINTIFF*

v.

PNC BANK, KENTUCKY, INC., *DEFENDANT*

JUDGES:
CHARLES R. SIMPSON III, CHIEF JUDGE,
UNITED STATES DISTRICT COURT.

MEMORANDUM OPINION

This matter is before the court on motion of the defendant, PNC Bank, Kentucky, Inc. ("PNC"), to dismiss for failure to state a claim upon which relief can be granted or, alternatively, for summary judgment in this action brought under sections 1132(a)(2) and (3) and 1132(a)(1)(B) of the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. § 1001 et seq.[1]

PNC was a directed trustee of the Bulk Distribution Centers, Inc. 401(k) Profit Sharing Plan ("the plan") in which the plaintiff, Kenneth G. Helfrich ("Helfrich"), was a participant. In the Spring of 1996, Donald L. Stump ("Stump") was owner and president of the company and the individual authorized to issue instructions to PNC regarding management of the plan assets. In April of 1996, Helfrich executed certain forms in order to facilitate the rollover of the major portion of his plan benefits to certain designated IRA mutual funds, with the balance of his benefits to be distributed to him. On May 1, 1996, Stump sent a letter to the attention of Brenda Higgins ("Higgins"), Employee Benefits at PNC, authorizing the transactions desired by Helfrich. Helfrich alleges that he was assured by Higgins that the transfers would be accomplished according to his instructions during the month of June. On June 28, 1996, Stump sent another letter to Higgins notifying PNC that it would no longer be trustee for the plan as of July 1, 1996. The letter directed PNC to liquidate the plan assets as soon as administratively practicable after June 30, 1996 and to wire transfer the proceeds to Lincoln National Life Insurance Company, the new trustee and investment manager for the plan. Apparently the June transfers of Helfrich's plan benefits were not made. The plan

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[1] The complaint contains a claim brought under 29 U.S.C. §1140 alleging discrimination and interference with protected rights. The complaint is bereft of any facts which would support such a claim, and the plaintiff's brief in opposition to the motion to dismiss does not respond PNC's argument for the claim's dismissal. For these reasons, Count III of the complaint will be dismissed without further discussion.

assets, including Helfrich's portion, were transferred to Lincoln National on or about July 11, 1996, and Helfrich's funds were placed in a money market account and remained there until Helfrich discovered the purported omission by PNC. Helfrich alleges that he sustained considerable loss, as the appreciation on the mutual funds was greater than that of the money market account. PNC played no role in the selection of Lincoln National as successor trustee or in the investment of the plan assets after the July transfer.

PNC has moved to dismiss or, alternatively, for summary judgment on the ground that Helfrich has failed to state a claim against PNC upon which relief may be granted. When a motion to dismiss is made, the court must take the allegations of the complaint as true and grant dismissal only when it is beyond doubt that the plaintiffs can prove no set of facts entitling them to relief. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). In considering the briefs of the parties on the motion, this court concluded that the memoranda were insufficient to fully evaluate the legal issues raised by PNC. While PNC submitted a well-written brief, it failed to include an analysis of some of the more recent case law. PNC offered an argument supporting dismissal of all the ERISA claims, asserting that a plan participant in Helfrich's circumstance has no means of redress under ERISA for conduct such as is alleged against PNC in this case. We do not agree that the case law dictates such a result, nor would we find that result in keeping with the carefully integrated enforcement scheme of ERISA designed to protect the interests of plan participants. The brief of Helfrich offered little of assistance to the court in its six pages. It failed to discuss the fiduciary duty issue at all, and was unavailing in its analysis of the wrongful denial of benefits question. The

court will therefore engage in some amplification of the issues and application of the law to the undisputed facts as they have been presented.

I.

PNC claims that, as a directed trustee, it was not a "fiduciary" of the plan and, therefore, may not be held liable for breach of fiduciary duties under ERISA, 29 U.S.C. § § 1132 (a)(2) and (3), citing *Grindstaff v. Green*, 133 F.3d 416 (6th Cir. 1998). In that case, the plaintiff sought to "ascribe to Defendant First American National Bank, the directed ESOP trustee, a duty to investigate the merits of any directives given to it by the ESOP Administrative Committee." *Grindstaff,* 133 F.3d at 425-26. The court held that as a directed trustee, the bank was not a fiduciary to the extent that it did not control the management or disposition of the ESOP stock it held in trust. First American had "no discretion pertaining to voting the ESOP stock." *Id.* The court noted that "[a] person is a fiduciary only with respect to those aspects of the plan over which he exercises authority or control." *Id., quoting, Sommers Drug Stores v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837 (1987). By contrast, Helfrich claims in this case that PNC failed to carry out the directives with which it was charged and as to which it was specifically authorized by Stump. Thus the allegation here is that PNC failed to carry out its duties in matters over which it had authority and control. We find therefore that *Grindstaff* is inapposite.

We conclude that *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999) is controlling on this point. In that case,

the plan participant claimed that Provident Bank failed to comply with his instructions to purchase 1,000 shares of stock for his account. The court held that the bank was an ERISA fiduciary stating

> Provident was an ERISA fiduciary as long as it exercised control over plan assets. Stauter argues that as of May 1, 1991, Provident retained no discretionary authority over the plan and was charged only with the "ministerial" task of transferring the assets to [the successor trustee]. However, the definition of a fiduciary under ERISA is a functional one, is intended to be broader than the common law definition, and does not turn on formal designations such as who is the trustee. *See Brock v. Hendershott,* 840 F.2d 339, 342 (6th Cir. 1988)(describing breadth of fiduciary status under ERISA); *Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 418 n. 3 (4th Cir. 1993)(stating that ERISA definition of fiduciary is "broader than the common law definition of a trustee"). It includes anyone who "exercises any discretionary authority or discretionary control respecting management of [the] plan or exercises *any authority or control* respecting management or disposition of assets." 29 U.S.C. § 1002 (21) (A) (i) (emphasis added). Because Provident controlled Plan assets, it is liable under ERISA as a fiduciary. *See Blatt v. Marshall & Lassman*, 812 F.2d 810, 813 (2d Cir. 1987); *see also Hendershott*, 840 F.2d at 342.

Smith, 170 F.3d at 613. We conclude that PNC was a fiduciary with respect to its purported obligation to transfer Helfrich's funds according to his directions and the authority granted to it for that purpose.

II.

Count I of the complaint must be dismissed to the extent that it seeks to hold PNC liable under 29 U.S.C. § 1132(a)(2). The law is clear in the Sixth Circuit that "a cause of action under § 1132(a)(2) permits recovery to inure only to the ERISA plan, not to individual beneficiaries." *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir.), *cert. denied*, 513 U.S. 871, 115 S. Ct. 193, 130 L. Ed. 2d 126 (1994), *citing, Tregoning v. American Community Mutual Insurance Co.*, 12 F.3d 79, 83 (6th Cir. 1993). As in *Adcox*, Helfrich seeks recovery on his own behalf, not on behalf of the plan. That portion of Count I brought under §1132(a)(2) must therefore be dismissed.

III.

a.

PNC contends that the remainder of Count I must be dismissed, as it does not seek a remedy which is available under §1132(a)(3). Section §1132(a)(3) provides:

> A civil action may be brought–
>
> (3) by a participant, beneficiary, or fiduciary
> (A) to enjoin any act or practice which violates

> any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

Citing the case of *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 2063 (1993), PNC urges that the "equitable relief" authorized by § 1132(a)(3)(B) does not include Helfrich's purported lost earnings on his retirement funds. It contends that what Helfrich seeks are traditional compensatory damages, rather than a form of equitable relief. In *Mertens*, a class of participants in a defunct plan brought suit against a nonfiduciary, the plan's actuary, alleging that his conduct caused the plan to be under-funded and eventually terminated. The Supreme Court addressed the narrow issue of whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. *Mertens,* 113 S. Ct. at 2066. The court noted that the participants sought what they couched as "appropriate equitable relief," but that they were not, in actuality, seeking a remedy traditionally viewed as equitable, such as injunction or restitution. The participants apparently conceded that they sought compensatory damages, but stressed that "equitable relief" at common law included compensatory damage awards for breach of trust. The court noted in the opinion that the Court of Appeals had held that restitution was unavailable, and that the petitioners had not challenged that ruling. The court the held that the "equitable relief" authorized by § 1132(a)(3)(B) encompasses "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *id.* at 2069. This court finds,

however, that our inquiry does not end with the *Mertens* case.

b.

In 1990, some three years before the Supreme Court's *Mertens* decision, the Sixth Circuit was faced with an action remarkably similar to the one presently before us. In *Warren v. Society National Bank,* 905 F.2d 975 (6th Cir. 1990), a plan participant sought redress under §1132(a)(3), claiming that the bank breached its fiduciary duty to him under the plan:

> Dr. Warren claims that, although the bank distributed all the plan assets to which he was entitled, the bank distributed them contrary to his instructions, directly causing a severe diminution in their value. Thus, he charges that by its negligence or for an impermissible purpose, it acted in such a way as to deprive him of a benefit to which he was entitled under the plans, thereby violating the provisions of the plans and of ERISA. The "carefully integrated civil enforcement provisions" of section 502(a)(3) should be held to provide an avenue of redress.

Warren, 905 F.2d at 982. The court embraced the language in Justice Brennan's concurring opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), stating:

> We believe Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages...The term "other appropriate equitable relief" implies a broad range of remedies. We adhere to the principle "endorsed repeatedly...by the federal judiciary," that "when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." *Cia Petrolera Caribe, Inc. v. Arco Carribean, Inc.*, 754 F.2d 404, 428 (1st Cir. 1985) (footnote omitted). One of the important goals of ERISA is to make certain that participants and beneficiaries not be deprived of the full value of their plan benefits by a fiduciary's breach of a contractual duty.

Warren, 905 F.2d at 982.

In the wake of the *Mertens* decision three years after *Warren*, and *Varity Corporation v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) three years after *Mertens*, there has been considerable controversy over the question of what constitutes "appropriate equitable relief" under §1132(a)(3)(B).

In *Fraser v. Lintas: Campbell-Ewald,* 56 F.3d 722 (6th Cir.), *cert. denied*, 516 U.S. 975, 116 S. Ct. 477, 133 L. Ed. 2d 405 (1995), a panel of the Sixth Circuit concluded that the Supreme Court decision in *Mertens* foreclosed the § 1132(a)(3) avenue for recovery of monetary damages offered by the Circuit in *Warren,* noting that "In our view, *Mertens* effectively overrules *Warren.*" *Fraser*, 56 F.3d at 724. The court went on to note, however, that the plaintiff premised her right to monetary recovery not on §1132(a)(3), but rather on §1132(a)(1)(B), claiming that she was denied a benefit under the plan. The court stated that "it strains the overall structure of ERISA to characterize the right to timely notice of the rollover option or the tax advantages associated with that option as benefits due under the plan...While we understand plaintiff's reluctance to bring her claim pursuant to [§1132(a)(3)(B)] in light of *Mertens*,...that is the appropriate ERISA provision for an equitable claim such as hers." *Fraser,* 56 F.3d at 725-26. The panel in *Fraser* held that because of the *Mertens* decision, there would be no available remedy for the plaintiff's claim under §1132(a)(3), nor under any other ERISA provision. This court finds that such a result is unjust, and that we need not reach the same conclusion, at least under the facts of this case.[2]

It bears noting that the *Mertens* majority opinion was roundly criticized in a dissent authored by Justice White, with

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[2] We find that the *Fraser* case mandates the dismissal of Count II of the complaint which seeks recovery under § 1132(a)(1)(B). We conclude that the sums claimed to be lost as a result of PNC's purported failure to follow directions cannot be fairly characterized as benefits due under the plan. Count II of the complaint will therefore be dismissed.

whom Chief Justice Stevens and Justice O'Connor joined. The soundness of the *Mertens* decision has been questioned recently by two panels of the Sixth Circuit as well.

In *Allinder v. Inter-City Products Corporation*, 152 F.3d 544 (6th Cir.), *cert. denied*, ___ U.S. ___, 119 S. Ct. 1115, 143 L. Ed. 2d 110 (1999), the panel's cogent comments, while lengthy, are worth restating here in full:

> Allinder asserts that compensatory damages fall within the term "equitable relief" because such relief traditionally has been allowed in courts of equity where the claim involves a breach of trust. For support, Allinder relies upon Justice Brennan's concurring opinion in *Massachusetts Mut. Life Ins. Co. v. Russell*, where he noted that "while a given form of monetary relief may be unavailable under ERISA [when it would significantly conflict with some other aspect of the statutory scheme,] it cannot be withheld simply because a beneficiary's remedies under ERISA are denominated 'equitable.'" 473 U.S. 134, 154 n. 10 (1985). Whatever persuasiveness Justice Brennan's opinion may once have had on this question, it has since been squarely rejected by the Supreme Court's decision in *Mertens*...Accordingly, although Allinder may bring a claim for breach of fiduciary duty in her individual capacity, we nonetheless hold that the district court properly dismissed Allinder's action because the form of remedy sought is not available to her as a matter of

> law...But for the impediment that the *Mertens* decision placed on Allinder's ability to pursue her claim for monetary damages under §1132(a)(3), the district court's grant of summary judgment for ICP on the fiduciary duty claim would have been inappropriate at this stage in the litigation.
>
> Many commentators have noted that the Supreme Court's 5-4 decision in *Mertens* has resulted in a "betrayal without a remedy" for employees who pursue ERISA claims beyond the simple recovery of benefits. [citations omitted]. The outcome of this case lends support to such criticism. Allinder would have been entitled to monetary damages under the state-law claims she originally filed. These claims, however, were extinguished by ERISA's "ever-expanding preemptive black hole." Zanglein, Closing the Gap, 72 Wash.L.Q. at 674. ERISA, in turn, provides infertile soil for an employee to cultivate a meaningful remedy for anything beyond the recovery of basic benefits. Employees may seek monetary damages on behalf of the plan for an employer's breach of fiduciary duty [citation omitted]. They may not, however, seek similar relief for their own benefit when an employer breaches its fiduciary duty..."In this way, the combination [of the employee's] state cause of action [being] preempted by ERISA even while ERISA denies him any alternative remedy ... is disappointingly

> pernicious to the very goal and desires that motivated Congress to enact [ERISA] in the first place." *Sanson v. General Motors Corp.*, 966 F.2d 618, 625 (11th Cir. 1992)(Birch, J., dissenting). Constrained as we are by both ERISA's statutory provisions and the Supreme Court's construction of that language, this case provides no opportunity for us to redress the problems that employees face when pursuing a remedy under ERISA for an employer's or insurer's misdeeds beyond the recovery of the basic benefits to which they are entitled."

Allinder, 152 F.3d at 552-53. In *Allinder*, the participant sought compensatory and punitive damages for alleged intentional misrepresentations designed to delay payment of disability benefits to her. She had already received the full amount of benefits to which she was entitled under the plan. *Allinder, 152 F.3d at 545-46.* Rather, she sought damages for the delay in receiving the benefits -- consequential damages which the court found were not recoverable.

In *Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999), a different panel of the Sixth Circuit again discussed, albeit in dictum, the problems for aggrieved ERISA participants inherent in the *Mertens* decision.

> Although we find that *Mertens* is not applicable to the instant case, we hasten to note that while *Mertens* and its progeny [*see Varity Corp. v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996) are currently the law of the land, as a matter of public

> policy, academics and legal commentators have been extremely critical of the holding espoused in *Mertens* because of its narrow scope and unjust result. [footnote 12 containing citations omitted]. In fact, the Sixth Circuit has expressed its displeasure with the apparent inequity *Mertens* provides to aggrieved parties seeking remedies under ERISA. [Citing Allinder]...*Mertens* restricts plan beneficiaries to remedies such as mandamus, injunction, constructive trust, and restitution, even if those beneficiaries suffer harms that can only be properly rectified through compensatory damages...Under *Mertens*, it is dubious whether a plan beneficiary would get "appropriate remedies," as Congress intended. See H.R.REP. NO. 101-247, at 55-56 (1989), reprinted in 1989 U.S.C.C.A.N. 1906, 1948. [footnote 13 containing legislative history omitted].

Gerbec, 164 F.3d at 1024.

In 1996, the United States Supreme Court decided *Varity Corporation v. Howe*, 516 U.S. 489, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996). *Varity* involved claims by former plan participants against their employer and plan administrator, alleging that they were induced through trickery to withdraw from the plan and forfeit their plan benefits. The Supreme Court determined, among other issues, that §1132(a)(3) authorized these plaintiffs to seek relief for their individual harm caused by the administrator's breach of fiduciary obligations. *Varity Corp.*, 516 U.S. at 492. In the

Varity decision the court did not abrogate its holding in *Mertens*, as there was no issue respecting the availability of compensatory damages raised in the petition for certiorari. The district court in *Varity* had determined that the participants were entitled to "appropriate equitable relief," and included both an order to reinstate them into the plan and an award of monetary relief. On appeal, the United States Court of Appeals for the Eighth Circuit stated

> The relief awarded includes payments of money that plaintiffs would have received if they had remained member of the M-F Plan, but we do not think these payments can properly be characterized as "damages," and thus unavailable under Section [1132(a)(3)]. Rather we view the payments as restitution. Equity will treat that as done which ought to have been done. Or, to put it in words that fit the present case more precisely, equity will disregard that which ought not to have been done...The payments we are ordering are exactly what they would have gotten if they had remained at M-F. They are restored to their rightful position. This is restitution, and the Supreme Court in *Mertens* twice listed "restitution" as a type of equitable relief available under Section 502(a)(3).

Howe v. Varity Corporation, 36 F.3d 746, 756-57 (8th Cir. 1994). The court explained

> *Mertens* simply holds that only "equitable relief" is available under Section 502(a)(3), 29

> U.S.C. § 1132(a)(3), and that this phrase does not include the collection of damages from persons who are not fiduciaries but act in concert with those who are fiduciaries. Nothing in *Mertens* precludes an award of traditional equitable relief, including an injunction, restitution, and the like. As plaintiffs now concede, Brief or Plaintiffs-Appellees p. 30, after *Mertens*, compensatory damages are not recoverable under Section 1132(a)(3). But the case by no means bars equitable relief for individual participants who have suffered a breach of trust.

Howe, 36 F.3d at 755. No challenge was raised to this portion of the appellate opinion. Thus the Supreme Court did not revisit the issue of the damage award, nor was the court invited to further clarify the *Mertens* decision.

The *Varity* decision did, however, more clearly delineate the distinction between legal (ie. compensatory and punitive damages) and equitable relief. The court distinguished the case before it from the *Russell* case in which the participant sought compensatory and punitive damages for emotional distress and aggravation of a back ailment allegedly caused by an improper refusal to pay disability benefits. The participant had in fact received the benefits due her under the disability plan and sought only the consequential damages for pain and suffering and personal injury allegedly arising from the withholding of benefits for the period during which they had been withheld. The damages sought were clearly extra-contractual legal damages. By contrast, equitable relief in the form of an order of reinstatement of the participants into the

benefit plan was before the Supreme Court on certiorari in *Varity*. The court noted the factual distinction between the two cases, and found that *Russell* was not controlling. The court then went on at length to discuss the purpose behind the inclusion of the catch-all provision §1132(a)(3), noting that

> The statute itself says that it seeks "to protect ...the interest of participants...and... beneficiaries...by establishing standards of conduct, responsibility, and obligation for fiduciaries...and...providing for appropriate remedies...and ready access to the Federal courts." ERISA §2(b). Section 404(a), in furtherance of this general objective, requires fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries." Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy.

Varity, 516 U.S. at 513. The court looked at the structure of the ERISA provisions:

> Four of [1332's] section's six subsections focus upon specific areas, i.e., the first (wrongful denial of benefits and information), the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). The language of the other two subsections, the third and the fifth, creates two "catchalls,"

> providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that these "catchall" provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that [§1332] does not elsewhere adequately remedy. And, contrary to Varity's argument, there is nothing in the legislative history that conflicts with this interpretation. See S.Rep. No. 93-127, p.35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R.Rep. No. 93-533, at 17, Leg. Hist. 2364 (describing House version in identical terms).

Varity, Id. at 512. The court noted that the participants could not avail themselves of any other ERISA provision to obtain appropriate relief.

c.

It is the opinion of this court that the remedy available to Helfrich is restitution, an equitable remedy, rather than a legal claim for damages. The Sixth Circuit panel in *Warren* found, on facts virtually identical to those before us, that a monetary award for a fiduciary's breach of his contractual duty under the plan to transfer plan assets at the participant's direction was available under §1132(a)(3) to make the plan participant whole. In reaching this conclusion, the court noted that "in many cases in which the recovery of

"extracontractual" compensatory damages under [§1132(a)(3)] has been denied, the plaintiffs sought compensatory damages for emotional distress." *Warren*, 905 F.2d at 980. The court also drew a distinction between the facts before it and those in *Russell*. The court found that *Russell* was not dispositive of the issue on the grounds that (1) the nature of the alleged injuries and the relief sought differed from that in *Russell*, and (2) the statutory basis for the claim in *Russell* was §1132(a)(2) rather than (a)(3). The court explained

> With regard to the nature of the claims, Dr. Warren claimed that the bank violated a contractual duty under the retirement plans to distribute his plan assets in accordance with his instructions...The fiduciary has a contractual duty to abide by the participant's election of the type of distribution he desires...Also, the injuries alleged by Dr. Warren-- tax and tax interest liability and loss of investment earnings-- are direct injuries resulting from the bank's failure to follow his instructions. In contrast, the plaintiff in *Russell* made no claim that the fiduciary of her disability plan violated a contractual duty. In fact, the plaintiff had received all the benefits to which she was contractually entitled. Also, rather than seeking damages for direct injuries, the plaintiff sought punitive damages and damages for the consequential injuries of emotional distress and the necessity of cashing out her husband's retirement savings.

Warren, 905 F.2d at 980. In finding that Warren sought an

appropriate equitable remedy, the court quoted from Justice Brennan's concurrence in *Russell*, concluding that "we believe Justice Brennan's conclusion is correct that under the law of trusts, a beneficiary is entitled to a remedy that will put him in the position he would have been in if the fiduciary had not committed a breach of trust, and that such a remedy includes monetary damages." *Warren*, 905 F.2d at 982.

We find that in the case before us PNC as a fiduciary has allegedly breached its contractual duty under the plan. The plan document states:

> §11.2 *Trustee/Custodian* The Trustee/Custodian shall be responsible for the administration of investments held in the Fund. These duties shall include:
>
> ...(b) making distributions from the Fund in accordance with written instructions received from an authorized representative of the employer...
>
> §11.4 *Division of Duties and Indemnification*
>
> ...(b) The Trustee/Custodian shall not be liable for the making, retention or sale of any investment or reinvestment made by it, as herein provided, or for any loss to, or diminution of the Fund, or from any other loss or damage which may result from the discharge of its duties hereunder except to the extent it is judicially determined that the Trustee/Custodian has failed to exercise the

> care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims.

As in *Warren*, Helfrich seeks only to be placed in the position he would have been in had PNC not committed the purported breach of trust. The monetary award he seeks arises from PNC's purported failure to fulfill its fiduciary duty under the plan. He does not seek any extra-contractual damages, such as in *Russell* and *Allinder*, nor does he seek a remedy from someone other that the fiduciary, as in *Mertens*.

PNC has cited *Green v. AIM Executive, Inc.*, 897 F. Supp. 342 (N.D.Ohio 1995) to support its characterization of the remedy sought by Helfrich as legal damages rather than restitution. We do not find *Green* to be persuasive on this point, nor is it binding precedent for this court.

The court in *Green* noted that, in light of *Mertens*, the question in determining whether a remedy is available under §1132(a)(3) is whether the relief requested is an equitable or legal remedy. *Green*, 897 F. Supp. at 347.[3] The court

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[3] As an aside, we would note that the court stated accurately that "the Sixth Circuit's reliance on the common law of trusts and the role of the courts in equity in finding compensatory damages recoverable in *Warren* is no longer valid." *Green*, 897 F. Supp. 346-47. The basis for the availability of a monetary award under §1132(a)(3) is not a wholesale acceptance of compensatory damages under the rubric of "equitable relief," but rather a proper characterization in a given case of the particular monetary award

concluded, however, offering no analysis, that as the benefits sought were not required by the plan, they could not be characterized as restitution. This conclusory statement is of little use to the court. Additionally, the facts in *Green* differ from those in this case.

Helfrich can identify with precision that which was taken from him when PNC allegedly failed to follow his directions. He gave specific written directives that certain amounts be invested in certain funds at a given time. The peculiar facts of this case arguably would permit restoration of Helfrich to the position he should have occupied but for the alleged breach.

In the case of *Schwartz v. Gregori, M.D.*, 45 F.3d 1017 (6th Cir.), *cert. denied*, 516 U.S. 819, 116 S. Ct. 77, 133 L. Ed. 2d 36 (1995), the United States Court of Appeals for the Sixth Circuit upheld a judgment in favor of a plan participant which consisted of a monetary award and prejudgment interest for breach of fiduciary duty, back and

---

sought as restitution. As noted in *Warren* extracontractual consequential damages do not arise directly from a breach of fiduciary duty under a plan, and are therefore precluded as a legal claim for damages unavailable under §1132(a)(3). The Sixth Circuit made clear in *Warren* that it believed the remedy sought by Warren to be restitutionary; that is, that the remedy sought to place Warren in the position he would have been in but for the bank's failure to follow his directions. Thus we conclude that Warren's remedy would be still be available to him under §1132(a)(3) under the *Mertens/Varity* standard addressing the characterization of an §1132(a)(3) remedy.

front pay for retaliation for seeking to enforce her rights under the plan, and attorney's fees. In relation to the back and front pay awards, the court discussed the characterization of remedies, noting that it is the nature of the remedy sought which is key. The court cited *Chauffeurs Local 391 v. Terry*, 494 U.S.558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990), noting that the Supreme Court had emphasized there that not all monetary relief is necessarily legal in nature:

> The Court's discussion [in *Terry*] of the attributes which justify the characterization of a money award as equitable is dispositive here. The Court stated that damages can be characterized as equitable where they are restitutionary ... Like in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960), the back pay at issue in this case was awarded against the employer rather than a third party, and thus operates to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation. While restitution generally is awarded to prevent unjust enrichment to the defendant, that is not required in every case. Restatement of Restitution §1 cmt. e (1936). Nor is it necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied "either by the return of something which he formerly had or by the receipt of its equivalent in money." [footnote omitted] 66 Am.Jur.2d Restitution and Implied Contracts §1 at 942 (1973).

Schwartz, 45 F.3d at 1022-23.[4]

In *Jackson v. Truck Drivers' Union, Local 42 Health and Welfare Fund*, 933 F. Supp. 1124 (D.Mass. 1996), the district court held that a restitutionary money award was available to a plan participant for breach of fiduciary duty under §1132(a)(3) in light of *Varity* and despite *Mertens*:

> Jackson also requests personal restitution on his own behalf for lost benefits. Here, plaintiff stands on shakier ground as the remedy he seeks--essentially monetary relief for unpaid medical claims--appears at first blush to have been foreclosed by the Supreme Court. *See Mertens*, 508 U.S. at 255, 113 S. Ct. at 2067-68 (monetary relief for losses sustained is not available under ERISA §502(a)(3) as "appropriate equitable relief").
>
> In a very recent opinion, *Varity Corp. v. Howe, supra.*, the Supreme Court cleared this obstacle. There, fiduciaries of an ERISA plan had misled a group of employees as to the financial health of a new plan to which they

---

[4] In citing the *Schwartz* case, we do not attempt to liken the remedy sought by Helfrich to an award of back pay. Rather, we cite the case for the propositions recognized in the Sixth Circuit that (1) not all monetary relief in necessarily legal in nature, and (2) unjust enrichment to the defendant is not required in every case to award restitution. *Schwartz*, 45 F.3d at 1022.

were fraudulently induced to transfer. When the new plan failed, the employees sought reinstatement to their former plan as an equitable remedy under [§ 1132(a)(3)]. 516 U.S. at ---, 116 S. Ct. at 1067-69. Distinguishing prior precedents, the Court held that "the words of [§1332(a)(3)]--'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title'– are broad enough to cover individual relief for breach of a fiduciary obligation." *Id.* at 1076. Thus, individual participants may sue directly for breach of a fiduciary duty so long as they seek an equitable remedy. *Id.* at ---, 116 S. Ct. at 1079. Of course, restitution is an equitable remedy. *Mertens,* 508 U.S. at 248, 113 S. Ct. at 2064-65...In the ERISA context, the equitable remedy of restitution includes compelling trustees to pay benefits due. Indeed, in reasoning later upheld by the Supreme Court in *Varity*, the Eighth Circuit held that restitution included paying benefits to retirees who wrongfully were lured away from the solvent benefit plan:

The relief awarded includes the payment of money that plaintiffs would have received if they had remained members of the [former plan], but we do not think these payments can properly be characterized as 'damages,' and thus unavailable under Section [§1132(a)(3)]. Rather we view the payments as restitution. Equity will treat that as done which ought to

have been done.

Conclusion

This court concludes that Helfrich's claim under §1132(a)(3) is in the nature of restitution -- he seeks to be placed in the position he would have been had not PNC allegedly failed to follow his directions with respect to his plan benefits. The court cannot turn back the hands of time, should he prevail on his claim. However, the court can seek to fashion an award to duplicate the benefit as he would have obtained had his directions been followed. We do not find that the holding in the *Mertens* case requires us to alter our analysis, inasmuch as the nature of the claim and the remedy sought there differ from that sought in the case before us. We agree with the district court in *Jackson,* that *Varity* has paved the way for the success of restitutionary claims. The comprehensive scheme of ERISA must certainly afford Helfrich a remedy under §1132(a)(3) for a breach of fiduciary duty in failing to administer plan assets in accordance with contractual obligations under the benefit plan.

For the reasons set forth herein above the motion of the defendant, PNC Bank, Kentucky, Inc., to dismiss will be granted in part and denied in part. A separate order will be entered herein this date in accordance with this opinion.

This 5th day of October, 1999.

/s/_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed December 22, 1999]

KENNETH G. HELFRICH)
Plaintiff,)
)
v.)
)
PNC BANK, KENTUCKY, INC.,)
Defendant.)

AMENDED ORDER

Motion having been made and for the reasons set forth in the memorandum opinion entered herein on October 5, 1999 and the court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that

1. The motion of the defendant, PNC Bank, Kentucky, Inc. to dismiss or, alternatively, for summary judgment (DN 17) is **GRANTED IN PART AND DENIED IN PART**.

2. Count I of the complaint is **DISMISSED TO THE EXTENT THAT IT ASSERTS ENTITLEMENT TO RELIEF UNDER 29 U.S.C. §1132(a)(2). THE MOTION IS DENIED IN ALL OTHER RESPECTS AS TO COUNT I.**

3. Count II of the complaint is **DISMISSED.**

4. Count III of the complaint is **DISMISSED.**

5. The motion of the defendant, PNC Bank, Kentucky, Inc., to stay discovery pending disposition of the defendant's motion to dismiss (DN 16) is **DENIED AS MOOT.**

6. **THE COURT HEREBY CERTIFIES, PURSUANT TO 28 U.S.C. § 1292(b), THAT THE COURT'S RULING WITH RESPECT TO THE CLAIM IN COUNT I OF PLAINTIFF'S COMPLAINT INVOLVES A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS A SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THAT AN IMMEDIATE APPEAL**

FROM THE COURT'S ORDER MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.

IT IS TO ORDERED THIS 22nd DAY OF DEC., 1999.

/s/_____
Charles R. Simpson III, Chief Judge
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

[Filed December 3, 1998]

3:98CV-734-S

KENNETH G. HELFRICH)
Plaintiff,)
)
v.)
)
PNC BANK, KENTUCKY, INC.,)
Defendant.)
)

Serve: Martha Andes Ziskind
Agent for Service of Process
500 West Jefferson Street
Louisville, Kentucky 4O202

COMPLAINT

Plaintiff, Kenneth G. Helfrich, by counsel, and for his Complaint against Defendant, PNC Bank, Kentucky, Inc., states as follows:

Complaint - dated 12/3/98

THE PARTIES

1. Plaintiff is an individual residing at 4236 Las Palmas Way, Sarasota, Florida 34238. He is a citizen of the State of Florida.

2. Plaintiff was a participant in the Bulk Distribution Centers of KY., Inc., ("Bulk") 401(k), profit-sharing, retirement plan ("the Plan").

3. Defendant is a Kentucky corporation doing business in Kentucky. Defendant was the trustee, custodian and otherwise fiduciary of the Plan.

JURISDICTION

4. The claims asserted in this Complaint arise under the Employee Retirement Income Security Act of 1974 ("ERISA") which is codified at 29 U.S.C. § 1001-1461. This Court has subject matter jurisdiction over these claims pursuant to 28 U.S.C. § 1132(e)(1). Venue is proper in this judicial district pursuant to 20 U.S.C. § 1132(e)(2).

THE FACTS

5. During the first half of 1996, Bulk elected change the trustees/custodian from Defendant to Lincoln Financial Group.

6. Plaintiff instructed Ms. Brenda Higgins, an agent of Defendant, that he intended to move his Plan assets from Defendant to a self-directed status.

7. On May 1, 1996, Bulk sent a letter authorizing the rollover and the distribution of a pre-1997 contribution directly to Helfrich's self-directed IRA's. Said transfer was to be made July, 1996 prior to moving the balance of the plan to Lincoln. A copy of the letter is attached hereto as Exhibit A.

8. Notwithstanding the direct authorization and instruction of Bulk and Plaintiff, Defendant failed to roll over the funds as directed, despite the fact that the Defendant confirmed this direction to Bulk and Helfrich.

COUNT 1 - BREACH OF FIDUCIARY DUTY

9. The Plan established and maintained by Bulk is an employee benefit plan under ERISA.

10. Defendant, and certain of its individual agents, are fiduciaries of the Plan.

11. At the relevant time, Helfrich was a participant and/or beneficiary in the ERISA plan pursuant to 29 U.S.C. § 1002(8).

12. Defendant breached its fiduciary duty to Plaintiff by failing to advise Plaintiff of relevant information concerning the Plan, misinforming the Plaintiff, and failing to follow the clear instructions concerning the rollover of Plaintiff's funds.

13. Plaintiff was damaged as a result of the breach of duty and is entitled to appropriate equitable relief pursuant to 29 U.S.C.§ 1132 (a)(2) and/or (a)(3).

COUNT II- BENEFITS DUE

14. If net for the wrongful conduct of Defendant set forth in the preceding paragraphs, Plaintiff would have received additional benefits under an ERISA plan.

15. Helfrich is therefore entitled to receiver benefits and a clarification of his rights under the ERISA plan pursuant to 29 U.S.C. § 1132(a)(1)(B).

COUNT III - DISCRIMINATION AND INTERFERENCE WITH THE PAYMENT OF RIGHTS

16. The actions of PNC and its agents discriminated against Helfrich and/or wrongfully interfered with the protected ERISA rights of Helfrich.

17. Helfrich was damaged as a result of the wrongful discrimination and interference by PNC and its agents and therefore is entitled to appropriate relief pursuant to 29 U.S.C. § 1140.

WHEREFORE, Plaintiff demands as follows:

a. Judgment against PNC Bank, Kentucky, Inc.;

b. Appropriate equitable relief including, but not limited to restitution, disgorgement, injunctive relief, and/or monetary damages;

c. His attorney fees as prevailing party, and costs;

d. Pre-judgment and post-judgment interest;

e. Any and all other relief to which he may be entitled.

/s/_____
Kathleen M. Flynn
SEGAL, SALES, STEWART,
CUTLER & TILLMAN
KENNETH L. SALES
KATHLEEN M. FLYNN
2100 Waterfront Plaza
325 W. Main Street
Louisville, Kentucky 40202
(502) 568-5600
Attorneys for Plaintiff

VERIFICATION

I, Kenneth G. Helfrich, state that I am the Plaintiff in the foregoing Complaint against Defendant, PNC Bank, Kentucky, Inc. and that the statements contained therein are true to the best of my knowledge and belief.

/s/_____
Kenneth G. Helfrich

STATE OF KENTUCKY)
SS)
COUNTY OF _____)

Subscribed and sworn to before me by Kenneth G. Helfrich, this 20th day of November, 1998.

/s/_____
Christel Keister
NOTARY PUBLIC, STATE AT LARGE

APPENDIX E

29 USCS § 1132 (2001)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought–

(1) by a participant or beneficiary–

(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 USCS § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 USCS § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus

reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USCS §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if–

(A) requested by the Secretary of the Treasury, or (B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USCS § 1145].

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 [29 USCS §§ 1181 et seq.] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1) [29 USCS § 1191b(a)(1)]). Nothing in this

paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) [29 USCS § 1166(a)(1) or (4) or § 1021(e)(1)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $ 1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USCS § 1021(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under

section 104(a)(4) [29 USCS § 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USCS § 1021(d)] with respect to any participant or beneficiary or who fails to meet the requirements of section 101(e)(2) [29 USCS § 1021(e)(2)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $ 100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $ 1,000 for each violation by any person of section 101(f)(1) [29 USCS § 1021(f)(1)].

(5) The Secretary may assess a civil penalty against any person of up to $ 1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [29 USCS § 1021(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [29 USCS § 1024(a)(4)], the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $ 100 a day from the date of such failure (but in no event in excess of $ 1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act [42 USCS § 1320b-14(c)(8)].

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought

by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [29 USCS § 1021(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USCS § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan–

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USCS § 6621].

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any

action under part 4 of this subtitle [29 USCS §§ 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [29 USCS § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USCS § 4975(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [*26 USCS § 4975*(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USCS § 4975(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor. Suits by an administrator, fiduciary, participant, or

beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USCS §§ 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)--

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if

the Secretary determines in writing that--

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USCS § 4975].

(m) Penalty for improper distribution. In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 USCS § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.